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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
)
Computer III Further Remand)
Proceedings: Bell Operating)
Company Provision of Enhanced)
Services)
_____)

CC Docket No. 95-20

COMMENTS

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SUMMARY

This proceeding is much broader than necessary. The Commission should have used this opportunity to close the book on its Computer III proceeding by focusing only on the narrow issue framed by the Ninth Circuit in California III: how nonstructural safeguards, absent a fundamental unbundling requirement, still adequately deter and prevent "access discrimination" by the BOCs. Instead, the Commission has chosen also to revisit a much broader issue: the relative costs and benefits of structural and nonstructural safeguards.

At the outset, the Commission should clarify its definition and use of the term "access discrimination". A decision not to offer a requested service in the absence of economic or technical feasibility is not discrimination, whether it is considered an exercise of market power or not. The Commission also should be careful not to let convenience of terminology obfuscate its previously recognized dichotomy between the nondiscrimination purpose and provisions and the market development purpose and provisions of its ONA initiative.

The only silver lining to the breadth of this proceeding is that the Commission clearly indicated that it will rely on experience and evidence, rather than hyperbole and hysteria. Experience clearly demonstrates that nonstructural safeguards are and have been effective in

preventing discriminatory behavior. Further, a clear understanding of the substance and context of the Georgia MemoryCall Order precludes reliance on that decision as "evidence" of past abuse.

Experience also shows that significant public benefits have been achieved through BOCs' participation in enhanced markets. These markets continue to be among the nation's most vibrant and competitive. In contrast, a separate subsidiary requirement would significantly repress consumer welfare, with no offsetting public benefits. Indeed, such a requirement would seriously jeopardize the viability of current mass market services, particularly in rural or smaller metro markets.

For these reasons, the Commission should reaffirm its structural relief policy and immediately return the BOCs to a full integrated environment.

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COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth"), hereby responds to the Commission's Notice of Proposed Rulemaking ("Notice") released February 21, 1995, in the above captioned docket. By its Notice, the Commission responds to the decision of the Ninth Circuit Court of Appeals,¹ which partially remanded to the Commission its BOC Safeguards Order.²

INTRODUCTION

In this further remand proceeding, the Commission has focused part of its inquiry on the narrow issue with which the Ninth Circuit found fault in the Commission's earlier decision. Specifically, the Commission has requested comment on the adequacy of its open network architecture

¹ California v. FCC, 39 F.3d 919 (9th Cir. 1994) cert. denied, ___ U.S. ___ (April 3, 1995) ("California III").

² Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) ("BOC Safeguards Order"), vacated in part, California v. FCC, 39 F.3d 919 (9th. Cir. 1994).

("ONA") policies and requirements as a set of nonstructural safeguards governing the former Bell operating companies' ("BOCs") participation in the enhanced services marketplace, notwithstanding the Ninth Circuit's prior determination that the Commission's ONA policies no longer require "fundamental unbundling" of the BOCs' networks as a condition of such structural relief. BellSouth believes that this is the only issue with which the Commission should be contending in this proceeding.

The Commission has twice in recent history concluded that the public interest will be served by permitting the BOCs to offer enhanced services on an integrated basis.³ Both times, the Ninth Circuit has identified a narrow deficiency in the Commission's analysis.

In California I,⁴ the court found fault with the Commission's justification of its reliance on yet to be adopted accounting controls as a complement to ONA and other nonstructural safeguards. The Commission responded to that concern in the BOC Safeguards Order by reasserting its reliance on those by-then adopted and implemented controls and by further strengthening those controls. The court

³ Amendment of Section 64.701 of the Commission's Rules and Regulations (Computer III), 104 FCC2d 958 (1986) (subsequent history omitted) ("Computer III proceeding"); BOC Safeguards Order, 6 FCC Rcd 7571.

⁴ California v. FCC, 905 F.2d 1217 (9th Cir. 1990) ("California I").

found in California III that the Commission's actions had cured the prior deficiency.⁵

The problem encountered in California III was the court's determination in the intervening California II decision⁶ that the Commission had modified its view of its ONA requirements, the Commission's own protestations to the contrary notwithstanding. Consequently, the court faulted the Commission for having failed to explain how the modified view of ONA still was sufficient to warrant structural relief. The court upheld all other aspects of the Commission's decision.⁷

Clearly, with such a historical roadmap behind it, the Commission should be positioned to bring this proceeding to a close. Having pursued its structural relief policy for a decade now, the Commission should be poised to write the final chapter and close the book on this initiative. All the Commission needed to do was to focus on the narrow issue framed by the court.

⁵ California III, 39 F.3d at 926-27.

⁶ California v. FCC, 4 F.3d 1505 (9th Cir. 1993) ("California II").

⁷ Among the Commission's decisions upheld by the Ninth Circuit were its rules regarding customer proprietary network information and its preemption of state regulations that would require separate personnel or facilities for the offering of the intrastate portion of mixed jurisdictional enhanced services. State regulators' challenges to the Ninth Circuit's analysis of the FCC's exercise of its preemptive power were recently rejected by the Supreme Court. Nos. 94-1173 and 94-1213, ___ U.S. ___ (petitions for cert. denied) (April 3, 1995).

Instead, the Commission unfortunately has also chosen to re-open the debate on the wisdom of its long-standing policy objective of permitting integrated enhanced and basic service offerings. In doing so, the Commission has thus opened the door to the hordes of service providers with whom the BOCs may, or even may not, compete, giving them yet another opportunity to hypothesize and speculate about all the imaginable, and some near unimaginable, ills that will befall the American public should the Commission not reverse its structural relief policy.

BellSouth is not unsympathetic to the dilemma the Commission apparently feels it faces, however, and therefore at least understands the reason the Commission may have taken this course. That is, to some extent, the task before the Commission of explaining why it no longer views fundamental unbundling to be a necessary safeguard for full structural relief is akin to trying to answer the proverbial question "when did you stop beating your wife?" To satisfy the court, the Commission is driven to accept the premise established by the court, i.e., that the Commission at one time required fundamental unbundling, and then must explain why it no longer does so. That the Commission never required fundamental unbundling as a condition of structural relief is potentially an unacceptable response to the question as framed, given the court's view of history.

The constraints on the Commission's ability to re-assert that it never required fundamental unbundling also place it in a false defensive position, not unlike the parent in the following dialogue witnessed recently between a parent and a six year old child:

CHILD: You said I could spend the night with Claire tomorrow night.

PARENT: No I didn't. Tomorrow night is not a good night for that.

CHILD: But you already said I could. I heard you.

PARENT: That's not what I said.

CHILD: Yes it is.

PARENT: Look, I'm not going to argue with you about this. Even if that is what I said, I am telling you now that you cannot spend the night at Claire's.

CHILD: Why are you changing your mind?

Like the parent, the Commission has the dubious task of explaining the reasons for a "change of mind" when the mind has not really changed. Also like the parent, however, the Commission has the opportunity to rely on more current information to avoid the fetters of the court's interpretation of the Commission's past policy decision. Thus, the Commission has solicited new information and data, based on actual experience with structural relief, so that it may reach a decision that confirms, but which is not based on, the past decisions. By soliciting current information, the Commission positions itself to escape the

disputed-premise-based argument cycle, much as the parent did in the above scenario:

PARENT: I talked to Claire's mother this morning. Claire has the chicken pox, so it doesn't matter what I said before. I'm telling you now you cannot spend the night with her tomorrow.

Thus, the sliver of a silver lining to this aspect of the Commission's inquiry is that the Notice sends a clear signal that the Commission intends to rely on evidence and experience, rather than hypotheses and hyperbole. As is shown herein, the Commission's policies have proven to be effective in promoting enhanced service development and deployment without catapulting the BOCs into a market dominance position, in contrast with opponents' past dire predictions of such a result. Additionally, the Commission's safeguards have been effective in preventing "access discrimination" that would disadvantage BOCs' competitors in enhanced service markets. Indeed, the information services sector of the economy remains among the fastest growing in the nation, and the BOCs are but one subset of hundreds or thousands of participants, both large and small, who are thriving in this industry. BellSouth is confident that the information that will be presented herein and by others will confirm that the Commission's past policy decisions in Computer III and the BOC Safeguards proceedings have clearly provided public benefits that far outweigh any associated costs.

I. The Commission Should First Clarify Its Use Of The
 Term "Access Discrimination"

The single issue upon which the Ninth Circuit's decision turned was the continued viability of the Commission's cost/benefit analysis in the BOC Safeguards Order once "fundamental unbundling" was removed from the equation. As a practical matter, since fundamental unbundling was never part of that equation in the first instance, its absence from the Commission's analysis had no impact on the continued viability of the analysis. Nonetheless, the Ninth Circuit has told the Commission that it at one time had required something that it did not, and the Commission has accepted that direction from the court as the premise for this proceeding.⁸ Thus, the task for the Commission in this remand proceeding is to articulate how ONA, absent a fundamental unbundling requirement, together with other nonstructural safeguards, provides sufficient protection against the litany of potential anticompetitive demons routinely conjured up by the BOCs' opponents.

Since the Ninth Circuit affirmed the Commission's safeguards against cross-subsidy concerns,⁹ the Commission has rightly devoted its attention to the discrimination prong of its traditional set of sensitivities. To be more specific, the Commission has focused on "access

⁸ Notice at n.36.

⁹ See note 5, supra.

discrimination" and has assigned that term a functional definition:

"Access discrimination" occurs when BOCs provide competing enhanced service providers (ESPs) with access to network services inferior to that provided to the BOCs' own enhanced services, or when BOCs otherwise refuse, as a means of exercising market power, to provide services desired by ESPs.¹⁰

While BellSouth concurs that activity of the type included in the first clause of this definition may properly be characterized as "discrimination" under prevailing common carrier regulation, BellSouth disagrees that activity covered by the second clause fits, in a legal sense, within a definition of discrimination. Clearly, improper exercise of market power may constitute an anticompetitive offense. However, a rational and legitimate business decision by one who holds market power is not an anticompetitive abuse of that power. Where the BOCs are under no obligation to provide network services on the mere "desire" of an ESP, their "refusal" to do so is not offensive behavior -- and it matters not whether such refusal is considered an exercise of market power.

Missing from the foregoing definition of access discrimination is recognition of the right of BOCs to have necessary and sufficient information for evaluating ESPs' requests (desires) before being obligated to respond to such requests. The definition also fails to acknowledge the

¹⁰ Notice, at n.4.

legitimacy of BOC evaluation and decisionmaking processes when presented with such information, notwithstanding that they may possess market power. The Commission should thus make clear that it did not intend by this definition to undermine or otherwise modify its previously articulated ONA service selection criteria.¹¹ Additionally, the Commission should confirm that its inclusion of market power based behavior in its definition of discrimination is a matter of convenience of terminology for purposes of this rulemaking and is not the creation of a new approach to consideration of discrimination claims.

None of this is to suggest that the Commission may not or should not concern itself with an improper exercise of market power. Rather, BellSouth is suggesting that the Commission maintain an appropriate perspective on the different purposes of the various components of its ONA requirements and policies. Specifically, the Commission should continue to recognize that its ONA rules were designed to address two purposes: one, to safeguard against discriminatory behavior by the BOCs as they participated in enhanced service markets on an integrated basis; and two, to provide opportunities for nonaffiliated ESPs to obtain

¹¹ The four previously adopted selection criteria are market demand, utility to ESPs, costing feasibility, and technical feasibility. The Commission acknowledged in the Notice that no ESP had ever sought Commission review of any BOC's application of these criteria in the service request/evaluation process. Notice at ¶ 21.

services they needed to provide their enhanced services regardless of whether BOCs were participating in such markets. Thus, the Commission needs to keep its ONA rule objectives in perspective and to acknowledge the distinction between those requirements that are more narrowly tailored to prevent or detect discrimination and those that serve a broader market development role.

The Commission recently has re-emphasized the dichotomy it has created between the anti-discrimination objectives of the ONA initiative and the other policy objectives of that initiative:

One purpose of requiring implementation of ONA was to unbundle basic services provided by the BOCs to promote the efficient and innovative use of the network by enhanced service providers. Another purpose of implementing ONA was to prevent the BOCs from cross-subsidizing enhanced services with revenues from regulated services or discriminating against independent enhanced service providers in favor of their enhanced service operations. This latter purpose was to be achieved through non-structural safeguards that replaced prior rules, which had required BOCs that offered enhanced services to do so through a separate subsidiary.¹²

This summary clearly reveals the Commission's past recognition of the distinction between ONA obligations designed to guard against discrimination directed toward the

¹² Open Network Architecture Tariffs of US West Communications, Inc., Order Designating Issues for Investigation, CC Docket No. 94-128, DA 94-1236, (Common Carrier Bureau, Nov. 8, 1994) (emphasis added).

BOCs' enhanced service competitors and additional obligations designed, not to guard against discrimination, but to foster development of enhanced services even when the BOCs are not introducing competing enhanced services. Questions of the adequacy of one form of safeguards over another in guarding against discrimination are unrelated to questions of the adequacy of the service selection or general unbundling requirements in promoting development of the enhanced service market place.

The converse is also true: the degree of unbundling required is unrelated to the safeguards imposed on the BOCs' actual provision of enhanced services. As the nonstructural safeguards are shown to be effective in preventing discriminatory behavior by the BOCs, a more pervasive unbundling obligation has no further bearing on the BOCs' nondiscriminatory participation in enhanced service markets.

For this reason, the likely arguments in this proceeding that "fundamental unbundling" (whatever that term means) is a necessary prerequisite to granting structural relief will be giant non sequiturs. At most, the ill-defined notion of fundamental unbundling is a buzz-word for a separate potential policy initiative for which the Commission has the discretion to solicit "buy-in" by promoting relaxed regulation of any kind, including less burdensome and more efficient safeguards. It is not, however, a safeguard unto itself, and is therefore not an

appropriate or relevant mechanism for guarding against perceived discrimination by the BOCs.

That the Commission can and may still require the BOCs to respond to ESPs' requests for unbundled network services in accordance with the four ONA service selection criteria as a precondition to structural relief does not make this requirement a discrimination safeguard. Rather, it is an independent requirement of the original ONA regime established by the Commission "to promote the efficient and innovative use of the network by enhanced service providers." The independence of this requirement from the ability of the BOCs to offer enhanced services on an integrated basis is evidenced further from the Commission's decision following the California I decision to continue to impose its ONA requirements on the BOCs regardless of whether it would later conclude again to grant structural relief.¹³

While the Commission has heretofore pursued its nondiscrimination and market development objectives jointly through its ONA requirements, it has not previously lumped them together under the ambit of preventing "access discrimination". Perhaps one reason the Commission has done so now is that it is attempting to be responsive to the Ninth Circuit's own failure to perceive the distinction

¹³ Computer III Remand Proceedings, Report and Order, CC Docket 90-368, 5 FCC Rcd 7719 (1990).

described above. Rather than perpetuating that misconception by its proposed definition of "access discrimination", however, the Commission should clarify the distinction. With the two policy objectives put in proper perspective, the Commission's task of describing how its ONA requirements, absent "fundamental unbundling", still address the Commission's discrimination concerns is made much more straightforward.

II. Experience Demonstrates The Effectiveness Of The Commission's Existing ONA Requirements In Preventing Access Discrimination

In its Notice, the Commission properly recognized that its ONA requirements are a panoply of interrelated safeguards against "access discrimination." The Commission summarized each of these safeguards and asked for comment on their effectiveness, individually and in concert, in preventing discriminatory behavior. As shown below, experience operating under these safeguards demonstrates that they are effective and serve their purpose well.

A. Comparably Efficient Interconnection

The comparably efficient interconnection (CEI) requirements are the cornerstone of the Commission's nondiscrimination safeguards. They define the essence of nondiscriminatory behavior by establishing a set of measurable parameters with which the BOCs must comply. Whether this obligation is applied in the context of service specific CEI plans or more broadly in a full structural

relief environment, it ensures, at a minimum, that competitors of the BOCs have access to the same network functionalities and performance levels as do the BOCs' own enhanced operations. The requirements thus ensure that the BOCs' competitors are not disadvantaged in the marketplace. Experience demonstrates that this safeguard serves that purpose well.

Interface Functionality The "interface functionality" parameter of the CEI requirements obligates the BOCs to make available standardized hardware and software interfaces that are able to support transmission, switching, and signalling functions identical to those utilized in the enhanced service provided by the BOC. As an added measure, information about those interfaces must be made available in accordance with the network disclosure rules. This requirement thus provides an objective yardstick for a comparative evaluation of the network functionality used by a BOC's enhanced service operation and those available to its competitors.

The BOCs have previously provided lists of documents containing interface information that apply both to the services they utilize under CEI offerings as well as to all the additional ONA services available to others that the BOCs themselves do not use in enhanced service offerings. On a prior review of the BOCs' compliance with this requirement, the Commission found that opponents of

structural relief had been unable to show that any BOCs employed or proposed to employ any unequal interfaces.¹⁴ To BellSouth's knowledge, no such showing has ever been made. Experience thus shows that this parameter has been effective in ensuring that ESPs have the same interface functionality available to them as is available to the BOCs' enhanced service operations and thereby are not disadvantaged in their service offerings.

Unbundling of Basic Services The "unbundling" parameter, in the CEI sense, obligates a BOC to unbundle from other network services the basic network services that underlie the BOC's enhanced offering and to associate the underlying services with a specific rate element in the BOC's tariffs. This mechanism ensures that an ESP that desires to use the same functionality that supports a BOC's offering has that functionality available to it on nondiscriminatory terms and conditions. It further ensures that the ESP is not obligated to buy additional functionalities that are not also bought by the BOC. This requirement thus serves its nondiscrimination purpose by squarely placing the BOC and its competitors on equal footing with respect to underlying network functionality.¹⁵

¹⁴ Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, ¶ 143 (1988) ("BOC ONA Order").

¹⁵ The additional, broader unbundling obligation under ONA requirements is addressed in section II.B., infra.

Resale The "resale" parameter operates as a check both on discrimination and on cross-subsidization. This requirement obligates the BOC to charge its enhanced service unbundled tariffed rates for the network functionalities they use. Thus, this condition precludes discriminatory pricing arrangements by ensuring that the rate charged is discernible in filed tariffs. The tariffed rate requirement also avoids improper cost-shifting, consistent with the Commission's affiliate transaction rules. BellSouth is aware of no circumstance in which a BOC's enhanced service operation is obtaining network services at anything other than tariffed rates. Experience shows that this requirement also places all enhanced service providers on equal footing.

Technical Characteristics This component of CEI requires that the technical characteristics, e.g., transmission parameters, quality, and reliability, of the basic services provided to the BOCs' enhanced services are equal to those provided to others. The Commission has examined the BOCs' procedures for circuit selection, installation, and maintenance and found that they do not vary on the basis of the identity of the ESP to whom services are provided.¹⁶ Thus, the BOCs' own enhanced service operations are subjected to the same degree of assurance of quality, reliability, and technical stability

¹⁶ See generally, BOC ONA Order, 4 FCC Rcd 1, at ¶ 467-72.

as are nonaffiliated ESPs. Discrimination is avoided through adherence to these processes, while adherence is demonstrated through annual reporting and affidavit requirements.

Installation, Maintenance, and Repair In contrast with the technical orientation of the foregoing parameter, this parameter requires that the time periods for installation, maintenance, and repair activity be the same for both integrated and nonaffiliated enhanced service operations. By adhering to the approved processes referenced above, this condition is met.

Moreover, experience demonstrates that there has been no discrimination in these areas of activity. Based on the BOCs' annual nondiscrimination reports and affidavits the Commission has reviewed over two successive three year periods, the Commission has not found any indication that the BOCs have engaged in any access discrimination against competing ESPs.¹⁷ Nor have any formal complaints alleging any form of access discrimination been lodged with the Commission since these nondiscrimination safeguards were originally imposed.¹⁸ Rather, all indications are that the safeguards are effective and working well.

End User Access In contrast with other CEI parameters, this parameter focuses on availability of functionalities to

¹⁷ Notice, at ¶ 29.

¹⁸ Id.

users of enhanced services, rather than to the providers themselves. Thus, it requires the BOCs to offer end users of its enhanced services no means of accessing those services that are not also available to users of other ESPs' offerings. This requirement is satisfied through the tariffing of all network services used by both customers and providers of enhanced services. Thus, no discriminatory advantage is conferred upon the BOCs' operations.

CEI Availability This parameter requires the network services underlying a BOC's enhanced service offering to be available to competitors at the time the BOC begins offering its enhanced service to the public. The BOCs also must make underlying capabilities available to competitors reasonably in advance of the BOC's introduction of its service. This condition thus negates any potential unfair advantage a BOC might otherwise have in testing and "de-bugging" its enhanced service.

Minimization of Transport Costs In order to offset the loop cost savings that collocation of enhanced service equipment could afford the BOCs, the Commission required the BOCs to minimize the transport costs of other ESPs or to otherwise equalize the potential disparity by charging the BOC's enhanced service operation for central office connections as if the enhanced service equipment were located two miles from the central office. Not only is the effect of this requirement to eliminate any unfair price

advantage a BOC's enhanced service might have had, but it actually disadvantages the BOC in comparison to other competitors who are located closer than two miles to the central office. This requirement is thus more than what is necessary to prevent discriminatory pricing in favor of the BOC's enhanced service.

Recipients of CEI This last parameter precludes the BOCs from restricting the availability of network services underlying their enhanced operations to any particular class of customers, except in accordance with generally applicable state tariff restrictions. Thus, CEI services are available to all ESPs equally, regardless of whether they are providing a service that competes with a BOC's enhanced offering. This parameter thereby effectively precludes discrimination on the basis of the type of enhanced service an ESP provides.

Since the Commission established these nine parameters, numerous service-specific CEI plans have been filed by the BOCs and approved by the Commission. BOCs are thus offering a variety of enhanced services on an integrated basis in conformance with the foregoing safeguards. Significantly, to BellSouth's knowledge, not a single complaint has been lodged against any one of the BOCs alleging that the BOC's enhanced service receives basic services with interface functionality different from that available to others (parameter 1); basic services that are more unbundled than

those made available to others (parameter 2); basic services at rates other than those specified in tariffs (parameter 3); basic services with better technical characteristics than are provided to others obtaining the same services (parameter 4); better installation, maintenance or repair service than is available to others (parameter 5); better access to its services by its customers (parameter 6); or earlier access to underlying basic services than has been provided to others (parameter 7). Nor has there been any claim of misapplication of the two-mile rule (parameter 8) or that ESPs or any subset of them are unreasonably restricted from utilizing any tariffed offerings (parameter 9). In short, the CEI parameters have been designed to guard against discrimination when the BOCs are providing their own services, as the Ninth Circuit acknowledged, and there has been no indication that those parameters are not serving that purpose.

B. Network Unbundling

CEI is designed to work, and it does work, as a discrimination safeguard in head-to-head competition. The parameters ensure that competitors have access to the same network functionality at the same time and under the same conditions as the BOCs' enhanced operation. Even the Ninth Circuit spoke favorably of CEI as a discrimination safeguard

mechanism "where a BOC is providing its own enhanced service."¹⁹

The only criticism of CEI as a discrimination safeguard suggested by the Ninth Circuit was that CEI does not allow ESPs to "pick and choose"²⁰ network services elements to design and develop enhanced services and, therefore, is not a substitute for ONA. In truth, this is not a criticism of CEI at all, because CEI was not intended to provide that opportunity, nor was it intended to be a substitute for ONA. Rather, CEI plus additional ONA service request processes and evaluation criteria form the guts of the ONA provisions that ensure that ESPs have the opportunity to which the Ninth Circuit referred. Thus, in addition to the CEI-based unbundling obligations associated with a BOC's introduction of its own enhanced services, the BOCs have additional unbundling obligations imposed on them that permit ESPs to obtain desired network services that the Ninth Circuit found lacking in the narrower CEI framework.

Indeed, the entire ONA regime was initiated with an admonition to the BOCs to solicit input from the enhanced services industry in order to develop and unbundle services that would be useful to that industry.²¹ Through numerous industry forums and individual BOC initiatives, ESP "wish

¹⁹ California III, 39 F.3d at 929.

²⁰ Id.

²¹ Computer III, 104 FCC2d 958, at ¶ 217.